No. 5745

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT

PACIFIC HUNTING AND FISHING COMPANY, an Oregon corporation,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR APPELLEE IN ANSWER TO APPELLANT'S REPLY BRIEF

GEO. J. HATFIELD,
United States Attorney,

ESTHER B. PHILLIPS
Asst. United States Attorney
Attorneys for Appellee.

Neal, Stratford & Kerr, S. F.

No. 5745

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT

PACIFIC HUNTING AND FISHING COMPANY, an Oregon corporation,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR APPELLEE IN ANSWER TO APPELLANT'S REPLY BRIEF

I.

Appellant's reply brief, pp. 1-9, quotes the various statutes and treasury department regulations relating to the steps by which a registered or enrolled vessel may proceed from one customs district to another, and the papers to be taken out in connection therewith. We think that our opening brief covered the subject. If the "Bessie Rutter's" actual destination was in fact Sand Point, then clearances, manifests, permits, etc., were required, for it was a case of a vessel trading between or going from one district to another. If, however, she were bound for the high seas, then the sta-

tutes would not cover such a voyage, for the high seas are not within a customs district of the United States. In the present case, the clearances and permits show that Sand Point was her destination; and the testimony of Captain Dodge as well as the statutes, etc., shows that vessels bound for fishing on the high seas were not required to get such papers, and did not ordinarily so do.

II

Pages 9-13 of appellant's reply brief quotes and relies on matters not contained in the Bill of Exceptions, and which are not a part of the record in this case and to which appellant's opening brief contained no reference.

The court will observe that this case was tried September 18, 1928, was submitted on briefs, and on October 29, 1928, the court having fully considered the case, ordered that judgment be entered in favor of the defendant (rec. p. 52). It was not a snap judgment on the part of Judge Louderback and the appellate court may surmise that the case was comprehensively briefed and was carefully considered by the court, as is indicated by the lapse of time between the submission and the decision. Thereafter and on December 10, 1928, the appellant asked for a rehearing. (Rec. p. 53) During the interval, by stipulation, depositions were taken of A. G. Spexarth and Sam Freeman. This was the third time Mr. Spexarth had testified. Plaintiff had not previously called Mr. Freeman as a witness, although his name and address were known (Rec. p. 28).

Of course the taking of testimony to perpetuate the same, pending an appeal, is proper, and the mere fact of taking such depositions would not prejudice the opposing party, in whose favor a judgment had been rendered. The petition for a new trial or a rehearing, came on for hearing on December 22, was argued, and submitted on briefs. The defendant made an objection to the introduction in evidence of the last deposition on the ground that no showing had been made by the appellant "of legal reason, accident, or surprise, etc." to explain why the evidence now offered had not been discovered earlier (Rec. p. 57). The point was argued and submitted on briefs. The objection was sustained by the court on January 10, 1929, and the court signed the findings in favor of the defendant (Rec. p. 57).

The Bill of Exceptions as made up shows these proceedings, but it does not incorporate the depositions of Spexarth and Freeman taken as in November, 1928, which the court had refused to read or consider. It did incorporate the two earlier depositions of Mr. Spexarth. As the case stood, the obligation was on the plaintiff in that case, (now the appellant), to make a showing to the District Court, such as to convince that court that it should set aside the ruling theretofore made. In other words, the plaintiff's first objective was to show to the trial court, good and sufficient reasons in law, why, after the case had been tried, briefs filed, the case submitted to the court for decision and the court rendered its decision, the plaintiff should then have the decision set aside and a second

opportunity to retry the issues. Had this case been tried before a jury, there can be no question as to the obligation upon the plaintiff to make a proper showing to the court, there could be no argument but that the plaintiff was bound to make an adequate showing of surprise, or other sound legal reason, or mistake, which would move the court to set aside the verdict of a jury. The trial court was in exactly the same position as the jury. If the plaintiff was bound to make an adequate showing for setting aside a jury's verdict and thus cause a duplication of trials, the same holds true for the court, for surely the court's time is not to be deemed of less value than a jury.

We submit that the record before this court shows that no preliminary showing was made by the plaintiff. In order for the trial court to open the depositions and read them it was incumbent upon the plaintiff to make a proper showing to move the court to open the record. The tender of further testimony from a witness who had already testified twice in the case forms no exception. The court might well look askance at such testimony and require adequate showing. No such showing was made, and the court sustained the objections of the defendant to allow a retrial and further evidence to be introduced.

The foregoing states the substance of the proceedings. Appellant's second and reply brief quotes from and relies on the third deposition of Mr. Spexarth, and the deposition of Mr. Freeman, as a ground for reversal of the trial court. These depositions were not in the Bill of Exceptions and form no part of the

record of the case. An application for a rehearing or a new trial was discretionary with the trial court and the grant or refusal is not ground for reversal. Nor can the substance of testimony which an appellant may have expected to offer in evidence in the event of a new trial be the basis of reversing a case already tried.

III.

THE AUTHORITIES.

An application for a rehearing rests in the discretion of the trial court. The grant, or refusal, is not a subject of appeal.

Foster, Federal Practice and Procedure, Vol. 2 (sixth ed.) p. 2176;

Roemer v. Neumann, 132 U. S. 103, 33 L. Ed. 277.

"After the case had been heard and decided upon its merits, the plaintiff could not file a disclaimer in court, or introduce new evidence upon that, or any other subject, except at a rehearing granted by the court, upon such terms as it saw fit to impose. The granting or refusal, absolute or conditional, of a rehearing in equity, as of a new trial at law, rests in the discretion of the court in which the case has been heard or tried, and is not the subject of appeal."

Pickett v. United States, 216 U. S. 456.

"There are a number of errors assigned. The first and tenth are for error in denying a new trial. The granting or denying of a new trial is a matter not assignable as error."

Batty Brokerage Co. v. Gulf etc. Ry., 17 Fed. (2d) 480 at 481 (C. C. A. 5th).

"On the other error assigned, it is elementary that in federal courts the granting or refusal of a new trial is within the sound discretion of the trial court, and error cannot be predicated thereon."

Cudahy Packing Co. v. City of Omaha, 24 Fed. (2d) 3 at pp. 7, 8 (C. C. A. 8th Cir.);

Holmgren v. United States, 217 U. S. 509, 54 L. Ed. at 867.

"It has been frequently decided that the allowance or refusal of a new trial rests in the sound

discretion of the trial court, and its action in that respect cannot be made the basis of review by writ of error from this court."

National Bank of Commerce v. United States, 224 Fed. 679 at 683, (C. C. A. 9th Cir.)

"No error is asssignable from a denial of a motion for a new trial. Pickett v. United States, 216 U. S. 456. And that the motion is based upon newly discovered evidence does not constitute an exception. Holmgren v. U. S., 217 U .S. 509."

American Trading Co. v. North Alaska Salmon Co., 248 Fed. 665 at 670 (C. C. A. 9th Cir.)

"It is suggested that the court below erred in not setting aside the verdict and ordering a new trial. It is well settled that in the United States courts the refusal of the trial judge to set aside a verdict and grant a new trial is not subject to review."

The showing made for grant of a new trial or of a rehearing was entirely insufficient.

Foster, Federal Practice (6th ed.) p. 2174.

"The petition for a rehearing should state fully the facts which show the nature of the new evidence, the facts which show that it could not have been found by the exercise of reasonable diligence before the hearing, that it was not known then, and that a diligent search was previously made for the evidence. These general averments of reasonable diligence and previous ignorance are insufficient."

A leading case upon the "discovery" of evidence is Wood v. Carpenter, 101 U. S. 135, 25 L. Ed. at 808:

"A general allegation of ignorance at one time and of knowledge at another, is of no effect. If the plaintiff made any particular discovery, it should be stated when it was made, what it was, how it was made, and why it was not made sooner."

Sun Life Assur. Co. v. Budzinski, 25 Fed. (2d) 77 at 78 (C. C. A. 3d. Cir.)

> "We are of opinion that the application does not show the testimony now regarded as newly discovered was not by proper diligence available at the trial, *and therefore the application fails to show that legel requisite for the allowance of such a motion.*"

Where the "newly discovered evidence" consists of a witness examined at the trial, the rule is strict.

46 Corpus Juris, 259.

> "A new trial will not be granted to permit a witness to testify to facts forgotten, or overlooked by him, or to which attention was not called, when giving his testimony at the trial. That the witness is better able to testify from having refreshed his memory or that memoranda have been found to refresh his memory and make his testimony more positive, does not change the rule. The case must be a very strong one indeed which will justify a new trial on the ground of newly discovered evidence, where the witness was in fact used upon the trial of the case. Legal diligence requires that a witness be examined fully and specifically as to his knowledge of all the matters in controversy. The rule applies to witnesses whose testimony is taken in the form of depositions."

The cases are fully cited in support of the foregoing rule.

For other cases showing the legal prerequisites to grant of a new trial on the ground of newly discovered evidence, see

Silva v. Reclamation District, 41 Cal. App. 326;
Estate of Cover, 188 Cal. at pp. 149-150;
Pollard v. Burger, 55 Cal. App. at 83.

CONCLUSION.

It would seem apparent that the appellant has made a direct attempt to have this court pass on evidence not in the record. We stand upon the record. The evidence was in fact in conflict and the judgment of the trial court should be affirmed.

GEO. J. HATFIELD,
United States Attorney,

ESTHER B. PHILLIPS
Asst. United States Attorney,
Attorneys for Appellee.

Dated: May 16, 1929.